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J. Peter Bragg

ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of:)	MM DOCKET No.: 98-66
)	
HICKS BROADCASTING OF INDIANA, LLC)	
)	
Order to Show Cause Why the)	
License for FM Radio Station)	
WRBR(FM), South Bend, Indiana,)	
Should Not Be Revoked;)	
)	
AND)	
)	
PATHFINDER COMMUNICATIONS CORP.)	
)	
Order to Show Cause Why the)	
License for FM Radio Station)	
WBYT(FM), Elkhart, Indiana)	
Should Not Be Revoked;)	

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Courtroom 1, Room 227
FCC Building
2000 L Street, N.W.
Washington, D.C.

Monday,
November 2, 1998

The parties met, pursuant to the notice of the
Judge, at 9:00 a.m.

BEFORE: HON. JOSEPH CHACHKIN
Administrative Law Judge

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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Charles Giddens	1305	1347			
Joseph Goldbach	1381	1410 1417			
Peter Tannenwald	1422	1432	1433		

E X H I B I T S

	<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>REJECTED</u>
<u>Mass Media Bureau:</u>			
128	1291	1291	

Hearing Began: 9:00 a.m.	Hearing Ended: 1:50 p.m.
Recess Began: 12:03 p.m.	Recess Ended: 1:30 p.m.

1 P R O C E E D I N G S

2 JUDGE CHACHKIN: Please be seated. Good morning

3 ALL: Good morning, Your Honor.

4 JUDGE CHACHKIN: Who is going to lead off,
5 Pathfinder or --

6 MR. BERNTHAL: Pathfinder, Your Honor.

7 JUDGE CHACHKIN: Pathfinder.

8 MR. HALL: Just a couple of small matters
9 remaining, Your Honor.

10 JUDGE CHACHKIN: Go ahead.

11 MR. HALL: At the end of last week, we had
12 indicated to you that we would be providing a better quality
13 copy of Hicks Exhibit No. 6. We have done that. We have
14 taken the liberty of clipping it to the volume that's on
15 your desk, as well as the one that's witness's desk.16 JUDGE CHACHKIN: So you have already made the
17 substitution?18 MR. HALL: Yes, I already have. We've also shared
19 it with everyone except Mr. Crispin, who is not here yet.

20 JUDGE CHACHKIN: Anything else?

21 MR. BOYCE: Your Honor, the issue of Mr. Kline's
22 deposition, we have gone through it and --

23 JUDGE CHACHKIN: Whose deposition?

24 MR. BOYCE: Mr. Kline's.

25 JUDGE CHACHKIN: Oh, Mr. Kline.

1 MR. BOYCE: That we were discussing last Friday.
2 It's been substantially reduced of what we intend to offer,
3 and we would request that this be identified and marked for
4 identification as Mass Media Bureau Exhibit 128.

5 JUDGE CHACHKIN: The document will be so marked.
6 (The document referred to was
7 marked for identification as
8 MMB Exhibit No. 128.)

9 MR. BOYCE: And we move its admission.

10 JUDGE CHACHKIN: Any objection?

11 MR. JOHNSON: No, Your Honor.

12 MR. BERNTHAL: No, Your Honor.

13 JUDGE CHACHKIN: The exhibit is received.

14 (The document referred to,
15 having been previously marked
16 for identification as MMB
17 Exhibit No. 128, was received
18 into evidence.)

19 JUDGE CHACHKIN: Now, as I understand the
20 procedure, you're going to follow with respect to the
21 principals, you're going to raise with them with the limited
22 issue. What is the procedure you're going to follow?

23 MR. SHOOK: Basically, Your Honor, when the
24 principals take the stand, we will ask the questions that we
25 feel need to be asked. And at the end of that examination,

1 we'll determine what, if anything, from their depositions we
2 need to offer. It may be that when we finish there won't be
3 anything.

4 JUDGE CHACHKIN: But as I understand, you will
5 offer them an opportunity to respond --

6 MR. SHOOK: With respect to --

7 JUDGE CHACHKIN: -- if you feel there is an
8 admission you want to introduce?

9 MR. SHOOK: Yes, sir, with any matter of concern,
10 we will bring it to their attention or we won't, you know,
11 seek to use it.

12 JUDGE CHACHKIN: All right. If you bring it to
13 their attention, then it will already be in the record.

14 MR. SHOOK: Right. So we anticipate that there
15 will be little or nothing from their depositions.

16 JUDGE CHACHKIN: All right. Who is going to lead
17 off for Pathfinder?

18 MR. BERNTHAL: Your Honor, first, let me thank you
19 for the scheduling accommodation. I appreciate that very
20 much.

21 JUDGE CHACHKIN: How is your mother?

22 MR. BERNTHAL: She came from the hospital Friday.
23 We think the doctors were wrong. So thank you for asking.

24 Your Honor, at this point, in accordance with your
25 prior ruling, we're going to have a brief opening statement,

1 and then we'll proceed with our first witness. We will go
2 first, and then, I think, Hicks will have one, and then
3 we'll go the first witness, if that's acceptable.

4 JUDGE CHACHKIN: All right, we'll follow that
5 procedure.

6 MR. BERNTHAL: Thank you.

7 Your Honor, now that the Bureau has presented its
8 case, it is, frankly, hard for us to remember that this is a
9 license revocation proceeding. Revocation case are the
10 capital punishment cases of communication law, the few cases
11 reserved for those licensees whose characters are so flawed
12 that they are deemed to be unfit to hold a license from this
13 Commission.

14 In revocation cases, mistakes, oversights, errors
15 are not enough. There has to be clear evidence of an intent
16 to deceive, a deliberate plan to lie to the Commission so
17 that some improper activity may occur will be concealed.

18 Your Honor, has there been any evidence, any
19 evidence at all of bad character here, of intent to deceive,
20 of motive? The Bureau chose to devote virtually its entire
21 case to the transfer and control issue, and we will have
22 much to say about that. We'll present expert testimony to
23 show that the relationship between Mr. Dille's station and
24 Mr. Hicks' station was normally and customary for those
25 early days of radio consolidation. And the evidence has

1 already shown Mr. Hicks' overriding on the key issue of
2 programming.

3 But we all need to remember that we didn't come
4 here because of a transfer or control issue. When the
5 Commission designated this case for hearing, someone in the
6 Bureau must have brought into the rhetoric of the pleadings
7 in this case, they imagined a massive deliberate fraud on
8 the Commission, that John Dille wanted to buy WRBR but
9 couldn't, so he set about on some planned destine, illegal
10 plan to park the license with a strawman, Mr. Dille would
11 secretly finance the deal, he really owned and operated the
12 station from the wings, and he'd have a secret option to buy
13 it, and, most importantly, he'd hide this nefarious plan
14 from the Commission.

15 Your Honor, if this was some clandestine crime,
16 John Dille must be the most inept criminal since the Gang
17 That Couldn't Shoot Straight.

18 Our evidence will show the following:

19 First, Mr. Dille consulted with counsel from the
20 very beginning to be sure that he was acting totally within
21 the law. Mr. Dille's choice for a licensee at WRBR was not
22 someone he knew particularly well, not someone who knew
23 nothing about the business or someone he could easily
24 manipulate or control. He picked a 35-year radio veteran
25 who had experience and independence.

1 Mr. Dille sought to include his children as
2 minority investors, not the best move for a man who was
3 trying to keep his involvement a deep secret.

4 Mr. Dille didn't quietly fund his kids through
5 private, untraceable family accounts. He did so openly
6 through his business, using his own professional staff who
7 sent formal memos to document every dollar advanced. Mr.
8 Dille told everyone what he was doing: his staff, his
9 advisors. He even told the seller right from the beginning
10 what the concept was, and he said it all in writing. There
11 are notes and memoranda documenting each step of the plan.

12 The joint operating arrangements, rather than some
13 clandestine real party in interest scheme was devised,
14 drafted and blessed by counsel, and there were follow-up
15 memos to keep personnel, to be sure that they understood the
16 arrangement and followed it closely.

17 Would anybody bent on concealing these
18 arrangements from the Commission have proceeded in this way?
19 We ask you, Your Honor, to focus heavily on this question as
20 you consider the evidence.

21 Where is the proof of some intend to deceive?
22 Where is the motive for John Dille to have perpetrated some
23 heinous fraud on the Commission? Does this theory make any
24 sense at all?

25 The Bureau called just one witness to prove that

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1 there was a deliberate fraud perpetrated here. But even
2 that witness, Mr. Sackley, offered the best proof imaginable
3 that there was simply no intent to deceive because if John
4 Dille intended to deceive the commission, why in the world
5 would he, by Mr. Sackley's own account, why would he tell
6 the details of his secret, illegal plan to a complete
7 stranger whom he met in a chance encounter, his words, in a
8 hallway, in a conversation that lasted no more than a minute
9 or two?

10 And if John Dille later intended to conceal
11 incriminating fact from the Commission, why in the world
12 would Mr. Sackley threaten him in New Orleans, by Mr.
13 Sackley's own testimony, that these facts were going to come
14 up if Mr. Dille didn't help to get Hicks to settle that
15 civil litigation up in Michigan? Why would Mr. Dille simply
16 reply, "I've done nothing wrong. I have nothing to hide."?
17 The answer, of course, is that John Dille didn't think he
18 had something to hide. He didn't intend to deceive anyone.
19 He thought his plan was perfectly proper and legitimate.

20 And so did the lawyers who advised him. They will
21 tell you so in their testimony. This scheme wasn't a scheme
22 at all. It was a reasonable, proper, legal business plan
23 carried out aboveboard in a manner consistent with the
24 Commission's rules.

25 Unless you're prepared to believe that there was

1 some grand conspiracy here involving lawyers, employees,
2 advisors and even complete strangers, you are not going to
3 be able to read any intent to deceive from the facts of this
4 case.

5 The specific misrepresentation issues here will
6 prove to be complete red herrings, Your Honor. The so-
7 called failure to disclose issues relating to the Dille
8 Children's options to acquire Mr. Hicks' stock will dissolve
9 in the face of clear documentary proof, supported by the
10 testimony of those who were there, that these arrangements
11 may have been talked about from the beginning, but they were
12 only agreed upon days before closing. The option
13 arrangements were then promptly filed with the Commission.
14 There is absolutely nothing in this issue that supports an
15 attack on anyone's character, let alone that of Mr. Dille,
16 who neither prepared, signed or even saw the application
17 before it was filed.

18 Finally, what about Mr. Dille's promise in the
19 February 1994 amendment to the application not to finance
20 Hicks Broadcasting's acquisition of the station?

21 Mr. Dille will testify, Your Honor, that he
22 honored that promise, that he didn't finance Hicks
23 Broadcasting's acquisition. The station was seller
24 financed, and Mr. Dille lent no money to the licensee. He
25 never received any right to control WRBR, any right to

1 foreclose on the station, any security interest in its
2 stock, any rights to interest payments which might allow him
3 to put undue pressure on the licensee.

4 We know that Mr. Dille did provide money to his
5 children to fund their investment. He will testify that he
6 didn't think that -- that his amendment statement even
7 addressed the question of his providing money to his
8 children. That won't surprise you, Your Honor, once you
9 learn that Mr. Dille specifically consulted with his
10 communications counsel before he funded the children's
11 investment, months before the investment was prepared.

12 You will hear both Mr. Dille and his lawyer
13 testify that he received clear advice from counsel that
14 funding his children was perfectly proper, and that the
15 Commission would have no interest in whether he did so, when
16 he did so, how he did so.

17 Of course, the amendment itself was not prepared
18 by Mr. Dille and it does not contain his words. It was not
19 based on anything that he said or did. The words are his
20 lawyer's words intending to reflect a request made by a
21 Commission staffer, whom the Bureau has chosen not to bring
22 to the witness stand.

23 Your Honor, you will have to decide whether this
24 amendment is evidence of some diabolical plot to deceive the
25 Commission or is simply a document which, with the benefit

1 of hindsight, might have been drafted a little bit more
2 clearly. There is simply no evidence here, no evidence at
3 all of an intent to deceive. There was nothing wrong with
4 what Mr. Dille and Mr. Hicks set out to do, and most of all,
5 there is not only no evidence of any motive to conceal, to
6 lie, or to dissemble, that the Bureau's basic theory doesn't
7 even square with common sense.

8 From the Bureau's case, it seems they may still
9 argue that the relationship between the Dille and the Hicks
10 stations went too far. They may still quarrel with the two
11 statements in issue here, the application and the amendment
12 should have been more complete, but they cannot in good
13 faith contend that John Dille lacks the character to remain
14 a Commission licensee.

15 John Dille is a 30-year broadcaster from a
16 distinguished media family, with a long and unblemished
17 record. You will hear that he is an accomplished and
18 respected FCC licensee, who has been a prominent contributor
19 to the well being of the radio industry.

20 His business plan was sensible, legal, and carried
21 out in a forthright and open manner. He didn't have any
22 reason in the world to lie about it. He didn't lie about
23 it. He did not mislead this Commission.

24 Thank you, Your Honor. That's my opening
25 statement.

1 JUDGE CHACHKIN: All right.

2 MR. KRASNOW: Thank you.

3 Commissioner Jim Cromwell has described the
4 revocation of a broadcaster's license as the FCC's version
5 of the death penalty. That description would not be far off
6 the mark with respect to the career of Dave Hicks. Dave has
7 spent over 35 years, virtually his entire adult life in the
8 radio broadcasting, and for about 15 years has been the
9 owner of radio stations.

10 Dave wants to stay in broadcasting. Most
11 importantly, he wants to clear his name. Dave's reputation
12 is very important to him. He's a quiet, low-keyed person
13 who may be too modest to tell you that he has earned the
14 respect of his fellow broadcasters, not only in the Midwest,
15 but across the nation. He has served with distinction as
16 chairman of the Radio Board of the National Association of
17 Broadcasters, and is a long-time member of the National
18 Radio Music Licensing Committee.

19 Dave had adapted to the many changes in the radio
20 marketplace. The record will show and you will hear a
21 witness this morning will tell you that in the early 1990s
22 smaller market radio stations were in severe economic
23 distress, and in order to stay afloat, engaged in a wide
24 variety of joint operating arrangements, including JSAs,
25 share technical and accounting facilities, and joint

1 programming arrangements, exactly the same type of
2 arrangements that were engaged in by WRBR.

3 Indeed, in 1992, the FCC blessed such joint
4 ventures as "being generally beneficial to the industry and
5 the listening audience as they enable stations to pool
6 resources and reduce operating expenses without necessarily
7 threatening competition or diversity."

8 Dave, like many owners of smaller market radio
9 stations, tried to cope by joining forces with other
10 broadcasters. He first tried to create economies by merging
11 his two Michigan stations with the one owned by Ed Sackley's
12 Airborne Group. However, when Ed Sackley first heard about
13 Dave Hicks' interest in acquiring WRBR, became very upset
14 and he initiated a campaign to force Dave out as an employee
15 and a director of the Crystal Radio Group.

16 Dave felt he had been wronged by Ed Sackley. A
17 judge in Kalamazoo, Michigan agreed and found that Ed
18 Sackley's actions were unjustified and indeed were "wilfully
19 offensive."

20 Here, Dave feels he has been wronged by the
21 Commission's Order to Show Cause. He intends to show beyond
22 a shadow of doubt that he has been truthful in all of his
23 statements to the Commission, and that he is in no way a
24 strawman for John Dille.

25 Dave's first contact with WRBR came when John

1 Booth approached him about buying the station. Dave
2 concluded that the price and terms that John Booth gave him
3 were not attractive. He later was approached by John Dille,
4 who was able to negotiate what Bob Watson described as sort
5 of a "no brainer" in terms of the attractiveness of the
6 deal. He had total sale of financing over a period of years
7 and a joint sales agreement with Pathfinder.

8 The transaction made sense to Dave Hicks. Arms-
9 length negotiations followed. Dave Hicks, with his
10 attorney, Rick Brown, negotiated a very good deal for Dave
11 Hicks. The documents are going to show in this hearing that
12 Dave Hicks made sure that his interests were protected.
13 Your Honor, surely the fact that Dave Hicks negotiated
14 favorable terms shouldn't be held against him.

15 The record will also show that Dave Hicks was not
16 a passive owner of WRBR. He exercised ultimate control over
17 personnel, finances and programming. He reviewed budgets
18 and all other aspects of the day-to-day operations. He was
19 much more active as an owner than many other clients that I
20 represent who are owners of radio stations.

21 With respect to programming, it was Dave Hicks who
22 envisioned the original change in programming format. It
23 was Dave Hicks who retained the programming consultant, and
24 it was Dave Hicks who negotiated the contract of the Bob and
25 Tom Show that has become so central to the station's

1 competitive success.

2 The Bureau's case here depends primarily on the
3 close relationship and close cooperation between Hicks
4 Broadcasting and Pathfinder. We were aware last week that
5 Your Honor apparently has some concern about some aspects of
6 the cost-saving measures. Specifically, the hiring by
7 Pathfinder and Hicks of a joint general manager, the
8 accounting agreement whereby Pathfinder pays Hicks
9 Broadcasting's bills, Hicks Broadcasting's adoption of
10 Pathfinder's employee handbook.

11 However, as they say about Wagner's music, it's
12 not as bad as it sounds. The important point here is that
13 all of these arrangements, without exception, were discussed
14 with and/or approved by Alan Campbell, Hicks Broadcasting's
15 communications counsel.

16 Let's return to the central issues in this case,
17 possible misrepresentation and lack of candor. The bottom
18 line question is whether Dave Hicks made statements to the
19 Commission with an intention to deceive. I agree with Mr.
20 Bernthal that there is absolutely no evidence to date, and
21 there will be no evidence of an intent to deceive.

22 At the time that Dave Hicks filed the assignment
23 application with the Commission and until March of 1994,
24 there was no understanding or agreement concerning the
25 option. Indeed, shortly after the option agreement was

1 entered into, the document was filed with the Commission.

2 Surely if Dave Hicks had an intent to deceive the
3 Commission, why would he ask his lawyer to file the option
4 with the Commission?

5 Also, at the time that he filed the assignment
6 application and the amendments with the Commission, he
7 hadn't discussed with John Dille whether John would provide
8 financing to John's children. In this connection, he relied
9 on materials furnished to him by John Dille and Alan
10 Campbell.

11 Put yourself in Dave Hicks' shoes. Why would he
12 have had a reason to question the accuracy of Mr. Dille's
13 statement to the Commission? He knew then and subsequently
14 made sure that John Dille would not be involved in the day-
15 to-day operations of WRBR.

16 As Mr. Bernthal mentioned in the beginning of his
17 statement, the stakes in this proceeding are very high,
18 revocation of licenses, fines of up to a half a million
19 dollars. For Dave Hicks, his reputation and his ability to
20 stay in broadcasting are at issue.

21 Your Honor, the record in this proceeding will
22 contain voluminous materials. There will be differing views
23 of events, but most importantly, there will be nothing in
24 the record to cast doubt on the character and qualifications
25 of Dave Hicks and his fitness to continue as a Commission